SPICe Briefing
Railway Policing (Scotland) Bill

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The Railway Policing (Scotland) Bill was introduced in the Scottish Parliament on 8 December 2016 by the Cabinet Secretary for Justice, Michael Matheson MSP. The Bill has been introduced following a recommendation by the Smith Commission to transfer legislative competence over the policing of railways and railway property in Scotland to the Scottish Parliament. The UK Parliament has since passed the Scotland Act 2016 which gives effect to the Commission’s recommendations.

The Bill sets out the framework for devolved railway policing in Scotland and is a necessary first step towards the integration of railway policing into the overall structure of Police Scotland.

This briefing considers the background to and the main provisions within the Bill.
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EXECUTIVE SUMMARY

- The Railway Policing (Scotland) Bill (“the Bill”) was introduced in the Parliament on 8 December 2016 by the Cabinet Secretary for Justice, Michael Matheson MSP

- The Bill is a relatively short one consisting of just 8 sections setting out the framework for devolved railway policing in Scotland as a necessary first step towards the integration of railway policing in Scotland

- Amongst other things, the Bill:
  - enables the Scottish Police Authority (SPA) to enter into railway policing agreements (RPAs) with railway operators to provide for policing in respect of the railways and railway property;
  - creates an obligation on the SPA to set up a formal mechanism for it and the Chief Constable of Police Scotland to engage regularly with railway operators about railway policing and to work in collaboration in order to agree on an annual basis how railway policing is to be carried out; and to make arrangements to obtain the views of railway users and other interested parties about railway policing in Scotland;
  - confers a power on constables of Police Scotland to enter specified railway property; and
  - removes functions conferred on the British Transport Police Authority (BTPA) and constables of the British Transport Police (BTP) by Part 3 of the Railways and Transport Safety Act 2003 in or as regards Scotland.
BACKGROUND

The Smith Commission

In September 2014, the then Prime Minister, David Cameron MP, appointed Lord Smith of Kelvin to chair a commission on further powers for the Scottish Parliament. The terms of reference for the Smith Commission (“the Commission”) were:

“To convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with recommendations for further devolution of powers to the Scottish Parliament. This process will be informed by a Command Paper, to be published by 31 October and will result in the publication of draft clauses by 25 January. The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom”.

In November 2014, the Commission published its final report with Heads of Agreement and recommendations for the devolution of further powers to the Scottish Parliament which included that “the functions of the British Transport Police in Scotland will be a devolved matter”. The recommendations in the final report were agreed by all five of the main parties in the Scottish Parliament.

The UK Parliament has since passed the Scotland Act 2016 (“the 2016 Act”) which gives effect to the Commission’s recommendations, including transferring legislative competence in relation to the policing of railways and railway property in Scotland to the Scottish Parliament. Scottish Ministers intend to use these powers to integrate BTP officers and civilian staff into Police Scotland.

To that end, the Railway Policing (Scotland) Bill was introduced in the Scottish Parliament on 8 December 2016 by the Cabinet Secretary for Justice, Michael Matheson MSP. The Parliamentary Bureau designated the Justice Committee as lead committee for Stage 1 scrutiny on 13 December 2016. The Committee agreed its approach to scrutiny of the Bill at Stage 1 at its meeting on 21 December 2016 and published a call for evidence.

The Policy Memorandum states that the policy objective of the bill is:

“…to pave the way for the integration of railway policing into the Police Service of Scotland (Police Scotland) by (a) providing the Scottish Police Authority (SPA) and Police Scotland with new powers in relation to the policing of railways and railway property and (b) removing powers in relation to such policing in Scotland from the British Transport Police Force (BTP) and the British Transport Police Authority (BTPA)”.  

The British Transport Police

The British Transport Police (BTP) was given statutory jurisdiction by the Railways and Transport Safety Act 2003 (“the 2003 Act”) to act as a railway police service across Great Britain, accountable to the BTP Chief Constable, the British Transport Police Authority (BTPA), and through them to the UK Parliament. The Explanatory Notes to the 2003 Act state:

“The BTP’s main duties consist of public policing, exactly like a Home Office police force. However, unlike a Home Office force, almost all of the BTP’s duties, and in particular its routine patrols, occur on private property, albeit property to which the public may have access i.e. railway stations and trains.

The BTP’s existing jurisdiction on this private property flows from a combination of a 1949 private Act of Parliament and numerous private agreements between the Strategic
Rail Authority (SRA) and the railway companies. Most operators of railway vehicles and certain railway assets are required under the Railways Act 1993 to have a licence. It is a condition of those licences that the operator must enter into an agreement with the SRA to engage the services of the BTP on its property. It is these agreements, combined with the 1949 Act that gives the BTP the right to police most railway property.

Section 31 gives the BTP a wholly statutory railway jurisdiction throughout England, Scotland and Wales. Within this jurisdiction a BTP constable has the powers and privileges of a Home Office constable. The jurisdiction extends over all railway property. It also extends outside railway property (a town high street for example) throughout Great Britain in relation to railway matters. This jurisdiction would, for example, allow a BTP constable to pursue a person who commits an offence on the railways but then absconds from railway property."

The BTP currently consists of a force headquarters (FHQ) and three divisions which represent three geographic regions of railways around Britain:

- FHQ are in London and retain overall command of BTP activity and house central departments and functions, including responsibility for resources such as forensics, CCTV and major investigations
- B Division covers the east and south of England and Transport for London. It accounts for the majority of passenger journeys in Britain across East Anglia, the south coast and the capital city, including London Underground and the Docklands Light Railway
- C Division covers Pennine, the Midlands, south west England and Wales. It includes the policing of major transport hubs such as Birmingham, Leeds and Manchester
- D Division covers the whole of Scotland, including the Glasgow Subway network, and is a unique division working under Scottish law and legislation

The BTP in Scotland

In Scotland, D Division has responsibility for policing around 2,800 kilometres of track and 358 stations including the 7 Borders Railway stations which opened in September 2015. The division currently has 284 (full-time equivalent) police officers, special officers and civilian staff. Its headquarters are in Glasgow and the division has a presence at 14 other leased premises at railway stations around Scotland. Police Scotland has indicated that its intention, following the transfer of responsibility for railway policing, would be to maintain a specialist railway policing function within the broader Police Scotland structure.

The Policy Memorandum to the Bill states that around 93 million passenger journeys are made in Scotland each year and that demand is growing. About 91% of rail travel in Scotland, both passenger and freight, is within Scotland, while around 8 million passenger journeys and 2 million tonnes of freight use the two cross-border rail routes.

The BTP in Scotland is currently funded through contributions from the railway industry whereby Network Rail, Train Operating Companies and Freight Operating Companies enter into a Police Services Agreement (PSA) with the BTPA, under which they pay for the policing services they receive. For example, both Abellio ScotRail and the ScotRail and Sleeper franchisees have entered into PSAs for the new passenger service franchises awarded by the Scottish Government which commenced on 1 April 2015.
Scottish Government Consultation

The Scottish Government published a written consultation document on 29 June 2016 inviting views by 24 August 2016 on how to ensure a smooth transition to integration of the BTP into Police Scotland; how to ensure railway policing in Scotland is subject to appropriate oversight; and how to maintain railway policing as a specialism. A total of 137 responses to the consultation were received, 107 from individuals (many of whom identified as either working for BTP or within the rail industry) and 30 from organisations. An independent analysis of the responses to the consultation was published in December 2016.

The Policy Memorandum to the Bill states that a significant number of those responding to the consultation were opposed to the integration of the BTP in Scotland into Police Scotland. (It should perhaps be noted that the consultation sought views on a wide range of issues which go somewhat beyond the specific provisions in the Bill.)

Concerns were expressed through consultation responses that integration may impact negatively on cross-border services; would reduce competence in tackling major UK issues such as terrorism; would reduce the safety of rail passengers and staff as a result of a possible reduction in officer posts; could increase costs for train operators; and would negatively impact on the terms and conditions of service for BTP officers and staff. However, the Policy Memorandum to the Bill states that:

“Overall, the majority of these concerns appear to relate to assumptions that consultees have made about the shape of railway policing in Scotland following integration. In particular, the assumption in most responses which raised these concerns was that the budget and number of railway policing officers would be reduced, and that a railway policing specialism would not be maintained within Police Scotland”.

The Policy Memorandum goes on to say that the Scottish Government’s plans are based on an assumption that the level of railway policing service will remain the same following integration, and this assumption is built into the financial memorandum for the Bill. More specifically, those costings are based on continuing with exactly the same numbers and rank/grade of officers in Scotland as present.

The following paragraphs outline some of the main concerns and points raised by key stakeholders in response to the consultation.

A transport policing ethos

Some respondents were concerned that the move towards integration of railway policing into Police Scotland would risk losing the unique style of transport policing which had been developed by the BTP and BTPA. For example, the response from the BTP stated:

“There is a risk to the benefits that are currently provided to passengers and the railway industry in Scotland if BTP’s functions in Scotland become a small transport unit within a large and complex organisation. This is because the specialist approach (sometimes referred to as the ‘transport policing ethos’) may not receive the priority currently enjoyed when set against wider policing demand of a much larger organisation that is rightly focussed on the policing requirements of a residential population”.

The response from the BTPA also commented in a similar vein:

“All officers of the BTP, from chief officers to constables, are expertly dedicated to railways policing. The BTP’s Leadership Team is wholly focussed on the delivery of a specialised service, thus helping to develop a unique ‘transport policing ethos’,

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characterised by a risk based approach and commercial awareness. The challenges of policing the rail environment are understood by frontline and senior officers alike, thus ensuring a coherent and unique policing approach.

The consultation document confirms the intention to retain a specialist railway policing function within Police Scotland. The Scottish Government may wish to consider what policies will ensure that the future structure of Police Scotland can match the effectiveness of the BTP model in terms of preserving the transport police specialism across its ranks”.

The BTPA went on to say that in order to maintain a transport police specialism within Police Scotland, measures should be taken to ensure that officers’ deployment remains exclusive to the railways environment and that policies are put in place to prevent the abstraction of officers to other duties.

With regard to maintaining a specialist railway policing function in Scotland, the Policy Memorandum to the Bill quotes from a letter from the Chief Constable of Police Scotland to the Cabinet Secretary for Justice in June 2016:

“In recognising the vast expertise of British Transport Police in policing the railway community of Scotland and to maintain public and industry confidence of continued excellence, I would see the maintenance of a specialist railway policing function within a broader Police Scotland structure. Whilst a consultation may inform the position in more detail, obvious options would be to have a specialist railway policing function as part of either Operational Support Division which currently owns the portfolios for Roads Policing, Events and Emergency Planning and liaison with Transport Scotland or to align railway policing with Borders Policing Command”.

The Scottish Government has stated that this will retain the specialist skills, knowledge and experience that BTP officers and staff have built up and will embed railway policing within the wider local, specialist and national resources of Police Scotland.

**Governance and accountability**

Currently, the BTP is accountable through the BTPA, a Cross-Border Public Authority (CBPA) while Police Scotland is accountable through the SPA, a Scottish Public Body.

A number of respondents to the consultation stated that the future priorities for railways policing in Scotland should continue to be informed by those who use and run the rail network. The Police Superintendent’s Association of England and Wales stated:

“As one might expect, successful policing of the rail network has evolved over many years. In numerous independent reviews the current model has been shown to be the most effective way to govern rail policing, not least because decision-making is directly informed by the interests of those who use and run the rail network. New governance arrangements should reflect the user-pays principle and experience has clearly evidenced that any oversight board should include members with specific knowledge of passenger and rail industry concerns.

Having the rail industry’s voice heard will be a critical success factor. The rail industry strongly values its ability to influence and shape the activities of railway policing resulting in the setting of priorities and objectives that are highly specific to the rail environment”.

One of the rail operators which responded, XC Trains Ltd (Cross Country), was concerned as to how the current arrangements could be replicated by the SPA:
“Currently, the railway industry stakeholders have a close and effective working relationship and a powerful voice in determining railway policing priorities. This ensures that railway policing is properly focussed on the needs of those working on and using the railway network. It is difficult to see how the SPA could provide direct membership and representation for the railway industry to secure the same level of influence over funding, strategy and objectives for railway policing as is currently secured and has driven the strong alignment and partnership between those stakeholders and the BTP”.

The Policy Memorandum to the Bill points out that the SPA will be under an obligation to establish a formal mechanism for it and the Chief Constable to engage regularly with rail operators on railway policing and also to invite participation from all railway operators operating in Scotland, whether wholly or on a cross-border basis.

**Agreements with rail operators**

The Scottish Government is the principal funder of railway infrastructure and service provision in Scotland, investing over £700 million per annum, and is responsible for setting Scotland’s long-term vision for rail. The investment includes franchise payments, subsidies and other funding for Abellio ScotRail (ASR), Serco Caledonian Sleepers Limited (SCSL), and Network Rail. The cost of railway policing in Scotland is currently over £21 million. The cost to ASR, SCSL and Network Rail (which together make up approximately 97% of the cost of railway policing in Scotland), is effectively supported (in part) by these franchise payments and subsidies from the Scottish Government, although cross-border franchises let by the UK Government Department for Transport (DfT) also contribute to these costs.

In its response to the consultation, the BTPA stated that, in determining a future cost allocation model which will operate in Scotland, the Scottish Government should bear in mind the principle of no detriment that underpins the Smith Commission’s agreement i.e. that none of the constituent parts of the UK should be adversely affected from policy decisions made in the process of devolution.

In a similar vein, the BTP stated that a new cost allocation model must take account of cross-border services and be formulated in such a way that there is an equitable distribution of costs for those operators who provide cost-border services. The BTP also stated that the issue of charging for centrally provided services also needs to be addressed in a way that does not lead to any detrimental impact, either financially or in terms of service delivery, on other Police Services Agreement (PSA) holders in England and Wales.

**Transfer of staff**

One of the recurring themes in the responses received concerned the future transfer of officers and staff from BTP into Police Scotland.

Currently, the terms and conditions of service of BTP officers and staff are different to those of constables of Police Scotland and staff employed by the SPA. The Scottish Government has stated that it recognises the importance of providing early clarity to BTP officers and staff on their terms and conditions following integration and will engage with officer and staff associations and representatives in order to determine a way forward that provides appropriate protections.

In its response, the BTP stated that it was “very unclear” what legal mechanism will be used for BTP officers and staff transferring to Police Scotland and, given that the current Transfer of Undertakings (Protection of Employment) Regulations (TUPE) would be unlikely to be applicable, this would appear to be problematic. The BTP points out that both officers and staff are currently contracted employees. In addition, officers are appointed as constables and are
subject to complex and longstanding terms and conditions, such as the provision of travel facilities, redundancy and resettlement, as well as movement protections. The BTP states that the legal and contractual issues associated with transferring staff in these unusual circumstances will need to be fully considered at an early stage of the integration process.

The BTPA stated that ensuring workforce morale throughout the integration process should be paramount and that this could be achieved by guaranteeing protections of existing employee terms and conditions. It would be also be helpful if the Scottish Government was able to provide clarity on the intended design of the workforce transfer as soon as possible.

The Policy Memorandum to the Bill states that the Scottish Government considers that the transfer of officers and staff from BTP into Police Scotland is likely to fall within the exclusion in regulation 3(5) of the TUPE Regulations 2006 because it is a transfer of administrative functions between public authorities. Accordingly, it is not a “relevant transfer” for the purposes of the TUPE Regulations and those regulations therefore do not apply.

However, the Scottish Government has stated that it intends to abide by the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector (COSOP), in particular by ensuring so far as possible, that (1) the transfer (including terms of transfer) is effected by legislation and (2) the staff transferred are treated no less favourably than they would have been had TUPE applied. The Scottish Government believes that this will provide certainty as to the terms on which staff are transferred. The Scottish Government has also committed to providing a “triple-lock guarantee” that secures jobs, pay and pension conditions through the course of integration.

BTP officers and staff also have separate occupational pension provision to Police Scotland officers and staff. In a similar approach to that intended for terms and conditions, the Scottish Government has stated that it will aim to ensure that, upon integration, pension entitlement is maintained without detriment. This will be achieved by considering options in line with the Scottish Government’s established principle that public service pensions should be affordable, sustainable and fair. In pursuit of this principle, the Scottish Government say that they will engage with officers and staff through their respective representative bodies, as well as the BTPA and scheme trustees to ensure the best outcome for all.

Broadly, options include maintaining current provisions as far as possible, or undertaking a transfer of rights into existing Police Scotland arrangements with no loss of accrued benefit. However, the Scottish Government says that it is aware that there are many aspects to both of these options that require further analysis and it is natural that all groups will seek advice during the process of discussions. The Scottish Government has stated that it will refer to pension and actuarial experts to ensure the arrangements are fair for officers, staff and the Scottish taxpayer.

The Scottish Government hopes that agreement on preferred options will be reached well in advance of integration taking place to give officers and staff the reassurance they need for the future. Draft legislation to implement the agreement will be open to consultation, and individuals and groups will have the opportunity to respond in order to ensure that the legislation meets the requirements of that agreement.

**The Bill**

The Bill is a relatively short one consisting of just 8 sections which sets the framework for devolved railway policing in Scotland. The Bill is essentially a first step towards complete integration of railway policing in Scotland and will, if passed, enable a substantial programme of work with key partners to deliver that integration in practice. The provisions in the Bill will confer railway policing powers on Police Scotland and the SPA in preparation for the integration of the BTP in Scotland into Police Scotland. Specifically, the Bill will:
enable the SPA to enter into railway policing agreements (RPAs) with railway operators to provide for policing in respect of the railways and railway property; set out arrangements for the referral of disputes concerning RPAs to the Scottish Ministers; and adjust the functions of the Chief Constable of Police Scotland to take account of the fact that arrangements for railway policing will be dealt with by RPAs (RPAs will replicate the current contractual arrangements in Police Service Agreements);

create an obligation on the SPA to: set up a formal mechanism for it and the Chief Constable to engage regularly with railway operators about railway policing; work with railway operators and the Chief Constable in order to agree on an annual basis how railway policing is to be carried out; and make arrangements to obtain the views of railway users and other interested persons such as trade unions about railway policing in Scotland;

confer a power on constables of Police Scotland to enter specified railway property; and

remove functions conferred on the BTPA and constables of the BTP by Part 3 of the 2003 Act in or as regards Scotland – these are the functions necessary to establish and maintain a police force for the policing of railways and railway property, and to enter into agreements with railway operators which determine how that policing is to be carried out and how much it is to cost, as well as functions of the BTP which allow it to police the railways in accordance with those agreements.

**Railway Policing Agreements**

Section 1 of the Bill inserts a new Chapter 12A (consisting of sections 85A to 85M) into Part 1 of the Police and Fire (Reform) (Scotland) Act 2012 ("the 2012 Act").

As set out above, the 2003 Act enables the BTPA to enter into agreements with railway operators for the provision of railway policing services. These Police Service Agreements (PSAs) currently provide for the BTP to carry out police functions on railways and railway property and also provide for payments to be made by railway operators to the BTPA to cover the cost of those functions.

As with the 2003 Act, the Bill contains a power to compel railway operators to enter into RPAs – this power is contained at section 85C of the Bill. This allows the Scottish Ministers to specify in regulations the operators who are to be subject to this requirement. Where disputes arise in relation to RPAs, the Bill provides that they can be referred to the Scottish Ministers and will be determined by either the Scottish Ministers or by someone appointed by the Scottish Ministers.

The Policy Memorandum to the Bill points out that as Scottish Ministers will have a role in the conclusion of RPAs, any disputes about the variation, interpretation or operation of RPAs which have already been concluded must be determined by a person appointed by Ministers rather than Ministers themselves.

Section 85A sets out what the nature of an RPA is. Essentially, these are contractual arrangements between the SPA and a railway operator which will see the operator pay for the cost of policing the railways and railway property which they use. An RPA must contain two specific provisions: firstly, it must contain a provision obliging Police Scotland to police railways and railway property in accordance with any agreement reached by the SPA, Chief Constable and the railway operator concerned. Secondly, it must contain a provision obliging a railway operator who is party to the agreement to pay the sums which the SPA charges for such policing.
The Bill provides that the Chief Constable must be involved in the negotiation of RPAs other than where the terms of an RPA are entered into or varied by means of the dispute resolution procedures set out at sections 85F and 85G of the Bill.

Costs which may be recovered under an RPA include indirect costs incurred in support of the provision of railway policing such as support services and/or administration costs. It will also be possible to take account of underpayments and overpayments for policing services in previous years – in essence, this means that a charge may be levied based on estimated costs, with a reconciliation being carried out once the actual costs of the RPA are known. The Bill provides that any charges must not exceed the cost of providing railway policing services.

**Engagement with railway operators**

The Bill places the SPA under an obligation to establish a forum to engage regularly with railway operators and the Chief Constable on railway policing. It requires the SPA to invite all railway operators operating in Scotland (whether wholly or on a cross-border basis) who have entered into an RPA to participate. The purpose of the forum will be to discuss and seek agreement with the Chief Constable and railway operators on the priorities and objectives for railway policing; the proposed arrangements by which priorities and objectives will be met (and how performance against these will be assessed); and the estimated costs of those arrangements.

The Policy Memorandum to the Bill points out that there are many other stakeholders with a strong interest in railway policing in Scotland including passengers, railway company employees and trade unions, and the officers and staff who will be tasked with carrying out railway policing functions. Accordingly, the Bill places a separate duty on the SPA to make arrangements to obtain the views of these stakeholders and any other people or organisations which the SPA considers may have an interest.

**Power of entry in respect of railway property**

The 2003 Act gives BTP officers the power to enter specified railway properties without a warrant, using reasonable force if necessary and irrespective of whether an offence has been committed. The rationale for this is that it enables BTP officers to carry out routine patrols of parts of the railway to which the public normally have access, such as stations and trains, as well as areas that may be accessed unlawfully, such as the track, where unauthorised access may pose a threat to railway safety.

While the existing powers of constables in Police Scotland will for the most part allow them to continue to perform the same railway policing duties as those currently carried out by the BTP, the powers of entry in the 2003 Act will require to be replicated following integration of the BTP into Police Scotland.

To that end, section 3 of the Bill provides a power of entry in relation to railway property to constables within Police Scotland. Railway property includes a track; a network; a station; a light maintenance depot; or a railway vehicle located on or in any of these. The power does not extend to private dwellings.

The power of entry will be exercisable by all police officers within Police Scotland and operational decisions as to the deployment of officers to carry out railway policing will rest with the Chief Constable. The Policy Memorandum to the Bill states that: 

“In making deployment decisions, the Chief Constable will need to consider the extent to which individual constables have appropriate expertise and training for the environment they are operating in, particularly where this may involve hazardous environments such as railway tracks”.
Functions of the BTPA and BTP

The 2003 Act established the BTP and the BTPA in statute. It provides the BTPA with the necessary powers to establish and maintain a police force for the policing of railways and railway property and to enter into agreements with railway operators to determine how that policing is carried out and how much it is to cost. The 2003 Act also provides the BTP with the necessary powers to police the railways in accordance with those agreements. The Bill is seeking to integrate railway policing in Scotland into the overall structure of Police Scotland and the SPA and as such, neither the BTPA nor the BTP will require to have any of their existing functions under the 2003 Act in Scotland following that integration. To that end, sections 4 and 5 of the Bill remove those functions.

Subordinate legislation

The Policy Memorandum to the Bill states that the Scottish Government wants to ensure that the strong relationship which already exists between Police Scotland and the BTP is maintained in order to continue the successful joint-working which has been developed on cross-border routes and across regional and functional boundaries. As the move towards full integration progresses, this will involve the Scottish Government and the SPA working in partnership with the UK Government, the BTP, the BTPA, Police Scotland and other key stakeholders to ensure a seamless transition of railway policing from the BTP to Police Scotland.

In order to deliver these objectives, the BTPA and the BTP will require to be provided with some functions in Scotland post-integration to allow for the cross-border policing of railways and railway property. Similarly, certain functions will be conferred upon Police Scotland and the SPA in relation to railways and property in England and Wales. The intention is that these matters will be taken forward through subordinate legislation (see below).

Written evidence

The Justice Committee issued a call for evidence on the Bill on 21 December 2016 with a closing date of 31 January 2017.

The Committee’s call for evidence on the Bill sought views on a wide range of potential issues regarding the integration of BTP into Police Scotland and posed questions which went beyond the provisions which are actually contained within the Bill. Understandably, many of the issues raised by respondents reflected those which had already been raised in response to the Scottish Government’s consultation. The following paragraphs therefore provide only a broad outline of the issues raised in written evidence.

Maintaining a specialist railway policing function

Police Scotland has indicated its intention to maintain a specialist railway function within one of its current divisions. A number of respondents sought clarification about whether this meant that staff numbers and funding would be ring-fenced. They also expressed concerns that this approach might lead to a loss or dilution of expertise and skills, and the abstraction of officers for other duties, depending on staffing resources and the priorities of the Chief Constable.

The BTP queried how specialisms, such as dealing with fatalities, responding to suspicious items and preventing cable theft, would be preserved and sustained in the future. Abellio ScotRail highlighted its preference for “a dedicated, ring fenced unit”. It also indicated that its experience had been that the priorities and response times of territorial policing were different to those of the railway police. Related issues raised included: whether the level and quality of existing BTP training would be maintained; whether police officers would be based at train
stations and retain a deterrent function, such as patrols of railway property; and how the relationships with train companies and railway operators would be maintained.

**Cross-border safety and security of passengers and freight**

A number of respondents stressed the importance of continued effective cross-border co-operation to ensure the safety and public confidence of passengers and train operating companies. Issues included: ensuring that the same level of service on both sides of the border is maintained; jurisdiction of crime where there is uncertainty about where an incident took place and the impact that might have on delaying investigations; and the impact of BTP officers having no legal jurisdiction in Scotland and the same for Police Scotland in England. The Law Society of Scotland recommended that consultations be undertaken on all draft instruments relating to cross-border enforcement and mutual aid and collaboration between Police Scotland and others.

**Counter terrorism: cross-border and UK-wide**

There were requests for clarity on how Police Scotland would work with others on counter-terrorism measures. The BTP stated that it will be important in any future arrangements to ensure that the approach to policing, security and risk management on both sides of the border is fit for purpose and “exhibits the high degree of interoperability appreciated now”. The BTP also stated that such incidents are rarely contained and asked the Parliament’s Justice Committee to consider “how a devolved model will retain the current seamless network-wide approach to countering terrorism?”

In its written evidence Police Scotland stated that the devolution of railway policing will have no detrimental impact on cross-border security arrangements:

“BTP and Police Scotland currently work together on a number of cross-border operations and this close working relationship would be expected to continue with BTP colleagues south of the border, following 1 April 2019. Police Scotland is experienced in working with other cross-border organisations and anticipates no issues working with BTP or service providers across the railway network.

The process of working towards full integration by 1 April 2019 will involve extensive consultation and engagement with all key stakeholders to ensure any risks associated with this type of operational activity are identified and fully mitigated. BTP are essential to that process in order for Police Scotland to fully understand their working arrangements and as such we would welcome the opportunity for full and early engagement in that regard. A fully collaborative approach will be the key to the delivery of a successful Programme”.

**Transfer of staff**

The majority of the written submissions raised issues about the uncertainty surrounding the terms, conditions and existing pension rights of BTP Scotland officers and staff. As pointed out above, the Policy Memorandum states that it is the Scottish Government’s aim to provide early clarity to BTP officers and staff on their terms and conditions following integration, and that it will engage with officer and staff associations and representatives in order to determine a way forward that provides appropriate protections. As previously mentioned, the Scottish Government has also committed to providing a triple-lock guarantee that secures jobs, pay and pension conditions through the course of integration.

Submissions from existing BTP employees, the BTP, the BTPA, and the BTP Superintendents’ Branch raised concerns about a lack of detail available to enable BTP staff to make a decision
on transferring to Police Scotland. They state that some may choose to leave if existing terms and conditions are not retained, and that this will impact on Police Scotland’s ability to retain skilled and experienced railway staff.

**Delegated Powers and Law Reform Committee consideration**

At its meetings on 17 January, 7 February and 21 February, the Delegated Powers and Law Reform Committee (“the DPLR Committee”) considered the delegated powers provisions in the Bill. Following its consideration, the DPLR Committee published its report to the Justice Committee on the Railway Policing (Scotland) Bill at Stage 1.

In its report, the DPLR Committee recommended that the power in new section 85C(1) of the Police and Fire Reform (Scotland) Act 2012 (as inserted by section 1 of the Bill) be amended at stage 2 so that it is subject to the affirmative rather than the negative procedure in Parliament.

Section 85C(1) in the Bill as introduced gives a power to the Scottish Ministers to make regulations requiring a railway operator (or a specific class of railway operators) to enter into a Railway Policing Agreement (RPA) within such period (if any) as may be specified in the regulations.

Amongst other things, the DPLR Committee took the view that while the power in section 85C(1) may be narrowly drawn, as suggested by the Scottish Government, its effect is not narrow. The DPLR Committee states that it is correct that the power could be used to make administrative changes, but this is not the only use to which it may be put. In the DPLR Committee’s view, the duty on railway operators to enter into RPAs pursuant to section 85C(1), along with power for the SPA to enter into such agreements, are the two central pillars on which the railway policing model rests. As such, it therefore considers that the power cannot be properly characterised as purely administrative in nature and invites the Scottish Government to consider providing for affirmative procedure which will allow an enhanced level of Parliamentary scrutiny.

**Alternative approaches**

In January 2015, following the publication of the Smith Commission’s final report, the BTPA published Options for the devolution of transport policing in Scotland⁴. The document set out three possible options.

Option one was considered to be the simplest route to achieve devolution through administrative rather than legislative means. It proposed to achieve some of the essential components of devolution in a relatively simple, cost-effective way, whilst retaining the BTPA’s responsibility to pass on the cost of the BTP to the rail industry, as well as over employment matters and pensions. This model looked at practical ways to increase BTP’s accountability to Scottish institutions and how to achieve greater alignment with Police Scotland on initiatives to keep the Scottish people safe. It also considered what role the SPA could play in new, joined-up arrangements for scrutiny and performance monitoring. It also recommended a change of branding for BTP in Scotland, with a renewed Scottish identity.

Option two consisted of a number of measures, both legislative and administrative, to devolve transport policing within Scotland. Statutory amendments would guarantee an alignment to principles set in Scottish law as well as to strategic police priorities set by Scottish Ministers. It would also have crystallised in statute the arrangements by which the Scottish Government may give direction to the BTPA and ultimately specify the direction of railways policing in Scotland. In

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³ Updated in April 2015.
essence, the model anticipates that the Chief Constable of BTP would engage with the Scottish institutions in much the same way as his counterpart in Police Scotland.

Whilst anticipating that the BTPA retain its responsibilities for pensions, employment contracts and defraying the costs of policing to the rail industry, this option proposed that planning and strategy-setting for railways policing in Scotland should be reviewed to enable greater involvement by the SPA. Option 2 also identified the changes needed to allow for greater co-operation and mutual assistance between BTP and Police Scotland. As with Option 1, this model sought to bring about a renewed image and identify for BTP in Scotland, which would be known as Transport Police Scotland.

Option three proposed what was to be considered to be the most complex route to devolution and would entail breaking up BTP and absorbing its Scottish operations into Police Scotland.

It set out what the BTPA considered to be some of the substantial implications for the workforce, both in terms of employment and pension arrangements, as well as the financial and legal liabilities which transfers might generate. This model also considered the funding implications of splitting the BTP and what burdens this would place on the rail industry in England and Wales. Finally, the option also considered the operational consequences of fragmenting railway policing; how this would dilute specialisation, and also how the experience of passengers – particularly on cross-border services – might be affected.

**Justice Committee Roundtable**

At its meeting on 1 November 2016, the Parliament’s Justice Committee held a roundtable evidence session on the future of the British Transport Police in Scotland. The meeting included representatives from the BTP, the BTPA, the BTP Federation Scotland, Police Scotland, the Association of Scottish Police Superintendents (ASPS), the Scottish Police Authority and Professor Nick Fyfe, Director of the Scottish Institute for Policing Research (SIPR).

The evidence session touched upon the three options set out by the BTPA and also covered the key issues which had been raised in responses to the Scottish Government’s consultation.

**Scottish Government’s view on alternative approaches**

In the Policy Memorandum to the Bill, the Scottish Government considered a number of alternative approaches to devolution of railway policing. These would, along similar lines to options one and two, set out above, see the BTP continuing to provide railway policing in Scotland on an ongoing basis, with some form of accountability to the Scottish Parliament and/or the SPA in addition to their existing UK-wide governance structures. While recognising that such an approach may appear to offer a level of continuity of service and stability in the short term for railway policing and officers and staff, the Scottish Government set out a number of reasons why this approach would not be the preferred option in the medium to long term.

For example, none of the options proposed would deliver a single command structure for policing in Scotland. The Scottish Government states that those proposing that the BTP should be accountable to governance structures in Scotland in addition to UK-wide structures had offered little detail as to how that could work in practice. The Scottish Government believes that the current accountability arrangements for the SPA and Police Scotland to the Scottish Parliament are much stronger and more effective than could be delivered within a Cross-Border Public Authority (CBPA). The Scottish Government asserts that a CBPA option would risk creating multiple lines of accountability for the BTP rather than simpler and more direct accountability that will be provided through integration with Police Scotland.
The Scottish Government also believes that there is no “status quo” option available. The reason being that railway policing is now a devolved matter and the UK Government has also announced its own intention to integrate infrastructure policing further. The Scottish Government states that, if the BTP is to be integrated into a wider infrastructure policing model in England and Wales, then Scotland would miss out on the benefits of integrating infrastructure policing functions. The Scottish Government believes this would occur as the provision of railway policing in Scotland would be aligned with wider transport infrastructure policing for England and Wales, but separated from all other aspects of infrastructure policing in Scotland – given Police Scotland’s responsibility for the policing of Scotland’s trunk road network, airports and ports.

The Scottish Government states that a stand-alone railway policing function for Scotland, which was neither integrated into Scotland’s policing structures nor into England and Wales’ infrastructure policing, would be a force of little over 200 officers and would lack the capability and scale needed to fulfil modern policing requirements.

As pointed out above, the Chief Constable of Police Scotland has already intimated that the intention will be to maintain a specialist railway policing function within the overall structure of the force. The Scottish Government has stated that this “will retain the specialist skills, knowledge and experience that BTP officers and staff have built up and will embed railway policing within the wider local, specialist and national resources of Police Scotland, ensuring that the policing of Scotland’s transport infrastructure is well equipped to meet current and emerging threats”.

**The implementation process**

As pointed out above, the Bill is a relatively short one setting out the framework for devolved railway policing in Scotland. The Bill is essentially a first step towards the integration of the BTP into Police Scotland and will, if passed, enable a substantial programme of work with key partners to deliver that integration in practice.

An overall programme of work is currently being taken forward through a Joint Programme Board (JPB) bringing together the Scottish Government with key partners – in particular, the UK Government Department for Transport (DfT), the BTPA and the SPA. The aims of the JPB are to provide joint leadership and partnership working in order to deliver the shared objectives of the Scottish and UK Governments for the devolution of railway policing and to deliver the Scottish Government’s stated aim of integrating the BTP into Police Scotland.

In addition to transferring legislative competence over railway policing, the Scotland Act 2016 also designated the BTPA and senior officers of the BTP as cross-border public authorities for the purposes of sections 88 to 90 of the Scotland Act 1998. Despite this, restrictions remain on the ability of the Scottish Ministers and the Scottish Parliament to exercise functions in relation to those authorities (for example, to transfer staff and property). As such, some changes to the law of England and Wales will also be required to give full effect to integration (for example, on cross-border policing of the railways).

The Policy Memorandum points out that there is a need for some aspects of this policy to be delivered through UK legislation, most likely in exercise of subordinate legislation-making powers under the Scotland Act 1998. This will include provision on the transfer of staff, assets and liabilities and provision on cross-border policing, as well as consequential changes in reserved areas or to the law of England and Wales. Certain elements of that work will also be subject to direct scrutiny by the Scottish Parliament in due course (as Orders under section 90 of the Scotland Act 1998 to transfer property and liabilities are subject to scrutiny in both the UK and Scottish Parliaments.)
The Annex to the Policy Memorandum sets out a summary of the Scottish Government’s current plan as to the overall legislative framework needed to deliver integration and is reproduced for information below.

Through the JPB, the Scottish Government and key partners are working towards a target date for completion of the overall programme of integration of 1 April 2019. On this date, officers and staff of the BTP in Scotland will transfer into Police Scotland, with Police Scotland assuming responsibility for railway policing in Scotland. Until the transition is complete, railway policing in Scotland will continue to be provided by the BTP on the same basis as present.

However, the Policy Memorandum to the Bill points out that there may be developments that could occur in the intervening period. These include any changes which could arise as a result of the UK Government’s Infrastructure Policing Review (“the Review”), which will have a bearing on the future of the BTP in England and Wales and therefore, the interface between policing in Scotland and the rest of the UK. For that reason, the timetable for integration will be kept under review.

In November 2015, the UK Government published its Strategic Defence and Security Review which included a commitment to “integrate infrastructure policing further and to review the options to do this”. The functions of the BTP, the Ministry of Defence Police (MDP), the Civil Nuclear Constabulary (CNC), the Highways England Traffic Officer Service (HETOS) and the Home Office police forces’ strategic road network and airports policing capabilities are all within scope of the Review.

Phase 1 of the Review, which took place during last autumn, recommended that the following two options be explored: (i) a National Infrastructure Constabulary which would combine the functions of the CNC, the MDP, the BTP, the HETOS and the Home Office police forces’ strategic road network and airports policing capabilities and (ii) a Transport Infrastructure Constabulary and an Armed Infrastructure Constabulary. The Transport Infrastructure Constabulary would bring together the functions carried out by the BTP, the HETOS and the roads and airport policing elements of Home Office forces. The Armed Infrastructure Constabulary would involve the incorporation of functions currently carried out by the MDP and the CNC.

The Home Secretary agreed with the two option recommendation and each of the options is to be pursued equally and developed into a full business case.
Annex

Legislative map for implementation of BTP integration

The following is the Scottish Government’s initial proposed outline of the legislation needed to integrate the BTP and the BTPA into Police Scotland and the SPA. This includes legislation to be passed by the Scottish Parliament, as well as subordinate legislation to be scrutinised by the Scottish Parliament and/or the UK Parliament. This outline may be subject to change as work on the overall programme develops.

Outline

1 Railway Policing (Scotland) Bill: The Bill will deliver the following key policy objectives:

- Conferral of necessary new railway policing functions on Police Scotland
- Introduction of model for funding of Police Scotland’s railway policing functions by the rail industry
- Provision to remove, in or as regards Scotland, railway policing functions currently conferred on the BTPA and constables of the BTP by Part 3 of the 2003 Act

2 Order in Council under section 90 of the Scotland Act 1998:

Section 90 of the Scotland Act 1998 allows for an Order in Council to be made – subject to scrutiny in both the UK and Scottish Parliaments – for the transfer of property and liabilities of a cross-border public authority whose functions are to be no longer exercisable in or as regards Scotland by virtue of an Act of the Scottish Parliament. This Order in Council would, in accordance with the terms of section 90, provide for the transfer of property and liabilities used or incurred in relation to the functions of BTPA and BTP senior officers which are no longer exercisable in or as regards Scotland.

3 Order under section 104 of the Scotland Act 1998:

This Order would make such further consequential and supplementary provision of a cross-border nature which is necessary or expedient in consequence of the Act of the Scottish Parliament, except any provision made in a section 90 Order. This might include provision relating to:

- Dissolution of the BTPA/BTP in Scotland, including transitional arrangements and consequential amendments to the Scotland Act 2016
- Transfer of staff
- Cross-border enforcement
- Mutual aid and collaboration between Police Scotland and the BTP (if needed)
- Removal of residual functions and other consequential amendments to reserved legislation
- Any other changes that may be required.

4 Regulations under section 48 of the 2012 Act and/or Ministerial determinations under those Regulations:

These Regulations will, if necessary, make adjustments to existing regulations and determinations on the governance and administration of Police Scotland to reflect, for example, the distinct terms and conditions of service of members of the BTP.
SOURCES


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